Supreme Court, U.S.
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No._____

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**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1993

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A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO
THE UTAH SUPREME COURT.

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# PETITION FOR A WRIT OF CERTIORARI

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Petitioner

**VOLUME ONE**

PETITION
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## QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner's Constitutional due process right violated by the Utah Board of Bar Commissioners and the Utah Supreme Court?

2. Was Petitioner's disparate treatment by the Utah Board of Bar Commissioners and the Utah Supreme Court a violation of petitioner's consitutional and statutory right to equal protection.

## PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Supreme Court of Utah are A. Paul Schwenke, petitioner on his own behalf and Wendell Smith, Esq. on behalf of the Utah State Bar, Office of Bar Counsel and the Board of Bar Commissioners, Respondents.

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## OPINIONS BELOW

The judgment and decision of the Utah Supreme Court is provided in the Appendix ( A- to A- ). The decision was reported in *In Re Schwenke*, 865 P.2d 1350, 1354 (Utah 1993).

## JURISDICTION

The Utah Supreme Court entered its opinion on 12/01/93. A Petition For Rehearing was denied on 01/18/94. This Petition for a Writ of Certiorari was filed on 04/18/94. Jurisdiction is invoked pursuant to 28 U.S.C.S. Section 2101(c) and Rules 10 and 13 of the Rules of the Supreme Court of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person [shall] . . . deprived of life, liberty or property, without due process of law. . .

The Fourteenth Amendment to the United States

Constitution, Section 1 provides:

> All persons born or naturlized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Rights Under the Law Act [42 U.S.C. § 1981], provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedngs for the security of persons and property as is enjoyed by white citizens, . . .

## STATEMENT OF THE CASE

The Utah State Bar, Office of Bar Counsel ("Bar Counsel") filed a formal complaint against Petitioner on **December 4, 1990.** (Record ("R") 2-10 [Appendix Av-1-2 to 17]. An attempt to serve a summons and copy of the formal complaint was also made the same day by mail to petitioner's former office address at 165 South West Temple, Suite 100, Salt Lake City, Utah 84111. R.1-10 [Appendix Av-1-1 to 2].

Petitioner did not receive actual notice of the formal complaint, did not file an answer to the formal complaint, and consequently, identical default certificates were entered on **March 19, 1991**, and again on **March 28 1991**,[1] as to the liability portion of the formal complaint. Transcript of March 2, 1992 hearing (hereafter "TSH"), pp. 16-19,(R. 24-27), Supplemental

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1. There is no explanation why Bar Counsel obtained two identical default certificates, in March of 1991.

Record ("SR") 42-45 Appendix Av-4-32 to 40]. A sanctions hearing based on the entry of the default was set a year later on **March 2, 1992**. (R. 79-80) [Appendix Av-3-1 to 2]. Petitioner attended the sanctions hearing. TSH pp. 2, 17-19, ("S.R." at 28, 43-45) [Appendix A-4-34 to 40]. The sanctions hearing was before a three member Hearing Panel designated by the Board of Bar Commissioners ("Bar Commission"). (S.R. 25)].

**(a) Due Process and Equal Protection violations were raised to the Hearing Panel at the March 2, 1992 hearing.**

Petitioner objected to the sanctions hearing on the ground that service of process was constitutionally defective:

> "MR. WALLACE:
> . . . As I see it, you basically have three positions concerning your objections to going forward; one is that you were not personally served, is that correct?
>
> MR. SCHWENKE:
> . . . That's correct.

MR. WALLACE:
The second is that you received no actual notice of the complaints against you . . . that's one of your arguments, that you didn't have sufficient notice . . .."
TSH p.18 (S.R. 44) [Appendix Av-4-37 to 38].

The record was clear that petitioner was not personally served nor was he served by registered mail at his address shown on the official roster of attorneys of the Utah State Bar, as required by the Procedures of Discipline of the Utah State Bar ("Bar Rules"). TSH p.21 (S.R. 47) [Appendix Av-4-42 to 44; Av-21-1 to 2]. That address was listed on the Bar roster as P.O. Box 57853, Murray, UT 84107. (R. 112)]. The Hearing Panel was persuaded by Bar Counsel's misrepresentation that the rule only required that petitioner be served at his last known address. TSH p.26 (S. R. 52) [Appendix Av-4-52 to 53].

MR. SMITH [BAR COUNSEL]:
. . . [T]he Utah State Bar, therefore, is entitled to rely upon the rules, and the rules say that we can -- we can obtain service by -- by mail to his last

> known address, that's what has occurred. . . . And the record speaks for itself, as far as the documents you have in the official file which show that we have obtained service in accordance with the rules, that the summons and complaint was served in accordance with the rules, that defaults have been entered in accordance with the rules, . . . TSH, pp. 22-23 (S.R. 48-49) [Appendix Av-4-44 to 47]

Accordingly, the panel overruled petitioner's due process objection stating, in part, as follows:

> MR. WALLACE:
> . . . [C]oncerning the lack of notice and the lack of personal service, the Bar of Disciplinary Rule does indicate that service may be at -- by registered mail at the last known address; whether or not that provides due process is another question, but that's the rule and we operate under the rule. TSH, p.26 (S. R. 52) [Appendix Av-4-53 to 55].

This March 2, 1992 hearing was also treated by the Utah Supreme Court as a hearing on the merits of the formal complaint, with the Supreme Court ruling as follows:

> Although Schwenke was in fact in default, he was nevertheless <u>afforded a full-scale hearing on the merits of the allegations against him</u>.

*In Re Schwenke,* 865 P.2d 1350, 1355 (Utah 1993)[Appendix Ai-19]

Contrary to this finding by the Utah Supreme Court, the Bar Hearing Panel did not conduct a hearing to establish the merits of the formal complaint. TSH pp.28,30 (S.R. 54, 56) [Appendix Av-4-55 to 57; Av-4-59 to 61]. Rather, the allegations of the complaint were deemed admitted pursuant to the entry of default, and the Hearing Panel addressed only the issue of sanctions, although it heard evidence bearing on mitigation and aggravation of the charges as they related to the issue of sanctions. TSH pp.28,30, 147 (S.R. 54, 56, 173) [Appendix Av-4-55 to 57; Av-4-59 to 61]. Some of the evidence related to mitigation and aggravation also coincidentally dealt with the merits of the complaint on some issues, but it does not mean that the Hearing Panel considered this evidence for the purpose of adjudicating the merits of the allegations of the

complaint. TSH, pp. 28,30 (S.R. 54, 56) [Appendix Av-4-55 to 57; Av-4-59 to 61]. Bar Counsel made this point very clear at the hearing.

> MR. SMITH:
> Just like to clarify then that we are going on assumption that the service was had, that the order -- that the order entering the default has been properly entered?
> TSH, p. 28 (S.R. 54) [Appendix Av-4-55 to 57].

> MR. SMITH:
> I again point out that the Utah State Bar is entitled to rely on the default that was taken in this case and we came here today relying on that default and we're entitled to rely on that default, those matters are established as true.
> TSH, p. 147. (S.R. 173) [Appendix Av-4-271 to 273].

Petitioner raised the disparate treatment issue in his closing argument, pointing to his former partner receiving probation for the same charges brought against petitioner, while Bar Counsel was seeking disbarment against petitioner. TSH pp.145-146 (S.R. 171-172) [Appendix Av-4-267 to 271]. The Hearing Panel recommended *inter alia* that petitioner be disbarred from

the practice of law. (R.193) [Appendix Av-5-1 to 23]. However, the hearing panel did not address the equal protection issue. (R. 182-194) [Appendix Av-5-1 to 23]. On **May 4, 1992**, the Bar Commission entered its Order adopting the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Hearing Panel. (S.R. 18)[Appendix Av-6-1 to 3]. On **May 5, 1992**, Petitioner filed his Motion for Reconsideration of the Order Adopting the Findings of Fact, Conclusions of Law and Recommendation of Discipline. (R. 110) [Appendix Av-7-1 to 2].

**(b) Due Process and Equal Protection violations were again raised pursuant to petitioner's Motion for Reconsideration.**

Petitioner's motion for reconsideration was grounded on the same alleged due process and equal protection violations raised at the March 2, 1991 hearing. See *Memorandum in Support of Motion for Reconsideration*, p. 1-11, (R. 111-121) [Appendix Av-8-

1 to 23]. A hearing on Petitioner's Motion for Reconsideration was held before the Bar Commission on **May 28, 1992**. (S.R. 10) [Appendix Av-11-1 to 9]. No transcribable record was kept of this hearing. The Bar Commission deliberated after petitioner was excused. See, *James Z. Davis Affidavit* ("Davis Affidavit") paragraph 8 [Appendix Av-26-5]. No transcribable record was kept of such deliberations. The Bar Commission granted petitioner's Motion for Reconsideration. (S.R. 23) [Appendix Av-11-1 to 9]. Following the hearing, James Z. Davis, the Bar Commission president, contacted Bar Counsel, *ex parte*, and instructed him to draft the order granting petitioner's Motion for Reconsideration. See *Davis Affidavit*, paragraph 9 [Appendix Av-26-5]. The Davis Affidavit was an extra-judicial affidavit inappropriately submitted to the Utah Supreme Court, outside of the record, on November 13, 1992, almost six weeks after the appeal

was filed. See *Davis Affidavit*, p.3 [Appendix Av-26-4]. As shown below, the Utah Supreme Court expressly relied on this affidavit in its ruling.

Bar Counsel drafted the order without any consultation with petitioner. See *Davis affidavit*, paragraph 9. [Appendix Av-26-5]. James Davis signed the order on June 8, 1992, but did not place the order in the mail to petitioner until June 16, 1992. (S.R. 23) [Appendix Av-11-9]. Petitioner saw the order for the first time on or about June 19, 1992, after it was signed and entered. (S.R. 23). Petitioner was shocked with the content of the order. First, it contained unnecessary, inflammatory, prejudicial material -- a false statement -- included for no apparent reason other than to smear petitioner's honesty.

> Respondent [petitioner here] further represented to the Board [Bar Commission] that he did not learn of the Sanctions hearing scheduled for March 2, 1992, until he arrived in Salt Lake on another matter.

> Assistant Bar Counsel advised the Board that Respondent told the Hearing Panel that he learned of the Hearing from someone residing at the address in Las Vegas, Nevada to which the notice of Hearing was mailed." *Findings and Order Granting Respondent's Motion For Reconsideration,* p. 2-3 (R. 20-21) [Appendix Av-11-3 to 4].

The Utah Supreme Court relied on this false statement in its published decision in this case:

> Schwenke appeared at the Sanctions hearing and admitted that he received the notice of the hearing on February 6, 1992, at the Las Vegas residence. *In Re Schwenke, supra* at 1355. [Appendix Ai-18 to 19].

The true fact was that the petitioner told the Bar Commission the truth. The following exchange from the transcript of the March 2, 1992 hearing bears this out:

> MR. WALLACE [PANEL CHAIRMAN]:
>
> Now, I notice that you're here today; what notice did you have of this hearing and when did you receive that notice?
>
> MR. SCHWENKE:
>
> When I appeared in my--the roll-call hearing in February before Judge Hutchings [a judge in Third Circuit Court in Salt Lake City], I appeared with Mr. Johnson, and -- and then he so advised me. TSH, p.17 (S.R. 43) [Appendix Av-4-34 to 35].

The order was also internally inconsistent. It found that the service of process was proper, although, it also implied that all of the proceedings through and including March 2, 1992, had been unfair, and consequently, granted petitioner's motion which was grounded primarily on his charge of defective service of process. (S.R. 21-23) [Appendix Av-11-1 to 9]

Petitioner filed his objection to the order granting his motion for reconsideration on **June 29, 1992.** (R. 127-129) [Appendix Av-12-1 to 5]. Because the order also required petitioner to file an answer in 10 days, petitioner filed a motion to quash service of the original summons on June 29, 1992. (R.90-91) [Appendix Av-12-5 to 8]. A week after petitioner filed his Objection (on **July 7, 1992**), Bar Counsel, to avoid addressing the merits of the Objection to Findings, Conclusions and Order that he prepared improperly, caused the petitioner

to be served with a new summons and the original formal complaint. (R.92-94)) [Appendix Av-1-1 to 17]. Prior to serving the new summons, no leave of court was requested, nor obtained, by the Bar Counsel from the Bar Commission to serve the summons and complaint out-of-time. Although, petitioner prepared his Answer to the formal complaint on **July 15, 1992,** through inadvertence he did not file such Answer until **August 5, 1992.** (R. 100-103) [Appendix Av-15-1 to 4].

On **July 31, 1992,** a new default was entered, based on the invalid service of process attempted on July 7, 1992. (R.97-98) [Appendix Av-14-1 to 2]. On **August 10, 1992,** the Bar Commission denied Petitioner's Motion to Quash on the basis that it was "rendered moot by the personal service on July 7, 1992." (R. 137) [Appendix Av-16 to 2]. The Bar Commission also denied Petitioner's Objection to the Findings and Order Granting Respondent's Motion for

Reconsideration, stating that petitioner could raise the issues contained in the objection when the hearing panel reconvened to rehear the case. (R. 137) [Appendix Av-16-2]. On the same day (**August 10, 1992**), Bar Counsel filed a Motion to Affirm Findings Conclusions and Recommendations of the Hearing Panel. (R.144) [Appendix Av-17-1 to 3]. Obviously, Bar Counsel intended for the Bar Commission to adopt the Hearing Panel's recommendations from the March 2, 1992 hearing. (R.144). However, those Findings, Conclusions and Recommendations had been effectively vacated by the June 8, 1992 Order granting petitioner's motion for reconsideration. (R. 120-121) (S.R. 23) [Appendix Av-11-1 to 9]. See, Reasons for granting Writ, *infra*.

**(c) Federal due process questions were raised in petitioner's brief filed on appeal to the Utah Supreme Court.**

Petitioner appealed the September 3, 1993 Order on the ground that the default entered July 31, 1992,

should be vacated. See *Notice of Appeal* [Appendix Av-19-1 to 10]. In Petitioner's Appellate Brief and Petitioner's Appellate Reply Brief, petitioner raised due process violations concerning the irregularity and the lack of integrity of the Appellate Record, and the attempt by the Bar to improperly raise and address issues outside the scope of the appeal. See Petitioner's Appellate Brief and Petitioner's Reply Brief [Appendix Av-24-1 to 56]. The Utah Supreme Court by Order/Opinion entered on December 1, 1993, affirmed the Bar Commissioners' Findings, Conclusions and Recommendations on the grounds that the December 4, 1990 service of process was valid. *In Re Schwenke, supra.*

**(d) The Federal due process questions were raised on the petition for rehearing.**

Petitioner raised several new due process violations and the same due process issue discussed

above in his petition for rehearing. See *Petition for Rehearing*, Appendix Av-20-1 to Av-20-33. The Utah Supreme Court denied the motion for rehearing without an opinion. *In Re Schwenke, supra.*

## REASONS FOR GRANTING THE WRIT

### (1) THIS APPEAL PRESENTS AN IMPORTANT QUESTION OF LAW LIKELY TO RECUR UNLESS THE DECISIONS OF THE UTAH BAR COMMISSION AND THE UTAH SUPREME COURT ARE SUBJECT TO REVIEW BY THIS COURT FOR POTENTIAL VIOLATIONS OF FEDERAL LAWS.

The Utah Supreme Court, which is the court of last resort in the State of Utah, has exclusive jurisdiction to discipline attorneys licensed to practice law in the State. *Constitution of Utah, Art. VIII, § 4; Utah Code Ann. § 78-2-4.* As demonstrated in this case, constitutionally protected rights can be violated during the disciplinary proceedings and if certiorari is not available such constitutional violations will continue unabated in this case and will likely recur in other cases.

If certiorari is not available, the Utah State Bar Commission and Utah Supreme Court can continue to violate constitutional rights, with impunity without accountability and lawyers like the petitioner will have no mean of redressing violations of their constitutional rights. The Tenth and Ninth Circuit courts have held that relief from attorney disciplinary orders of the state supreme courts is available only to this court by a petition for writ of certiorari based on violations of the due process or equal protection clauses of the Fourteenth Amendment. *Gately v. Sutton,* 310 F.2d 107, 108 (10th Cir. 1962); *Clark v. State of Washington,* 366 F.2d 678 (9th Cir. 1966). As shown below, this case falls well within the allowable limits of certiorari review.

Rule 10, Rules of the Supreme Court, requires that this petition for a Writ of certiorari will be granted only if there are special and important reasons for it. Rule

10(c) indicates that a special and important reason is when a "State Court has ... decided a federal question in a way that conflicts with applicable decisions of this court." Surely, the decision by the Utah Supreme Court in this case, which is fraught with violations of Federal law, and deprives petitioner of his constitutional rights is per se in conflict with decisions of this courts which upholds Federal laws.

**(2) THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A RULING OF THE UTAH SUPREME COURT DENYING PETITIONER HIS PROPERTY RIGHT TO PRACTICE LAW WHERE THE RULING WAS REACHED AT THE EXPENSE OF PETITIONER'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS.**

It is undisputed that petitioner's right to practice law is a constitutionally protected property or liberty right entitled to due process safeguards. *Sware v. Board of Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; *Willner v. Committee on Character and Ethics,* 373 U.S. at 102, 83 S.Ct. 1175, 1179 (1963).

One of the main issues presented for review is whether petitioner's right to due process was violated during the disbarment proceeding before the Bar Commission and the Utah Supreme Court.

Due process requires actual notice of suspension or disbarment proceedings, *Matter of Discipline of Schwenke*, 849 P.2d 573, 576 (Utah 1993), and if actual notice cannot be accomplished, constructive notice must at a minimum be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). A party is not "apprised" of the proceeding unless it properly advises of the subject matter of the pending hearing. *Aetna Insurance Company v. Hartshorn*, 477 F.2d 97 (1973)[A notice of a hearing on motions in connection with

consolidation of actions violated due process when the judge after disposing of the motion proceeded to hear claims on the merit.] Additionally, the notice must "permit [the affected individual] adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 14, 98 S.Ct. 1554, 1563, 56 L.Ed.2d 30 (1978).

Due process also requires that if a state enacted a statutory scheme for substitute service by statute or rule, the proceedings must " strictly comply" with the statutory scheme. *Murdock v. Blake,* 484 P.2d 164 (Utah 1971); *Lloyd v. Third Judicial District Court,* 495 P.2d 1262 (Utah 1972); *Garcia v. Garcia,* 712 P.2d 288 (Utah 1986); *Gookin v. State Farm Fire And Cas. Ins. Co.*, 826 P.2d 229, 233 (Wyo. 1992) citing generally 62B Am. Jur.2d, Process § 4 (1990); *Lisowski v. Schaack*, 71 F.R.D. 570, 572 (S.D. Cal. 1976); *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*,

953 F.2d 21, 24 (1st Cir. 1992); *Graff v. Kelly*, 814 P.2d 489, 495 (Okl. 1991). As shown in this case, Bar Counsel did not even attempt to comply with Rule 4(g), URCP, for substitute service on petitioner.

(a) **The Utah Supreme Court ruling validating the December 4,1990 service of process violates Federal due process.**

Rule XI(b) [Appendix Av-21-1 to 3] of the Utah Bar Rules governs the procedure for service of process in attorney disciplinary matters. The rule provides, in pertinent part:

> "Service shall be made personally upon the attorney in question or by certified mail to the last known address as shown by the official roster of attorneys of the Bar." *Id.*

The Utah Supreme Court, in another matter involving petitioner here, construed Rule XI(b) to require actual personal service.

> We think that suspension and disbarment proceedings call for adherence to minimum requirements of procedural due process, including notice of a hearing and notice that the attorney's

> license has been restricted or withdrawn. We therefore hold that service by certified or registered mail must be on the attorney personally and cannot be accomplished by delivery to a common-area receptionist at the address of the attorney's office. Such delivery does not amount to constructive notice. Nothing in the record or in the findings disputes [defendant's] claim that the signature on the return receipt was not that of his personal agent. We acknowledge that actual personal service will often be required when service by mail is ineffectual. However, in suspension or disbarment proceedings, actual notice is essential" *Matter of Discipline of Schwenke*, 849 P.2d 573, 576 (Utah 1993).(Emphasis added).

Accordingly, Rule XI(b) requires personal service of the summons and formal complaint on the attorney involved or his agent for service of process in either of two methods: (1) actual personal service, or (2) personal service by mail as reflected by the attorney's signature on the return receipt of a certified or registered mail that contained the summons and formal complaint. *Matter of the discipline of Schwenke, supra.* It is clear that Bar Counsel did not accomplish Rule XI(b) personal service

in this case. Rather, Bar Counsel only attempted Rule XI(b) service by mailing the summons and complaint by certified mail to the premises where Petitioner had last practiced law. The certified letter was apparently received and signed for by a Norma Davis, who turned out to be the temporary common-area receptionist at such address. It is undisputed that Norma Davis was not Petitioner's agent for service of process. As a result of the defective attempt at service, petitioner never received actual notice of the case.

Significantly, Bar Counsel only tried to serve Petitioner pursuant to the Rule XI(b). It is also important to note that Rule XI(b) does not provide for alternative or substitute service. However, where the Bar Rules are silent, Utah Rules of Civil Procedure (URCP) should be used to fill in the gap. *Rule 81(a),*[2] *URCP.* [Appendix

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2. Rule 81(a) provides, in pertinent part:

"These rules shall apply to all special

Av-22-19]. Rule 4(g), URCP [Appendix Av-21-4] governs "other service" where personal service could not reasonably be accomplished. Rule 4(g) provides, in pertinent part:

> "Other service. Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence ... the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served ... If the motion is granted, the court shall order service of process by publication, by mail from the clerk of the court, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event

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statutory proceedings, except insofar as such rules are by their nature clearly inapplicable."

> or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court." *Rule 4(g), URCP.*

The Utah Supreme Court ruling is based on a finding that Bar Counsel followed this rule for alternative or substitute service. However, there is absolutely no evidence in the appellate record that Bar Counsel even attempted to follow this rule prior to December 4, 1990. First, no motion was filed for leave to serve petitioner by any means other than the required manner of personal service set forth in Rule XI(b). Second, there were no supporting affidavits providing evidence of the diligent efforts made by the Bar to personally serve petitioner, setting forth the circumstances which made personal service of petitioner impracticable. Third, there was no court order granting leave to serve petitioner by means other than personal service, and setting forth the manner in which such alternative service should be

accomplished, as well the event or events as of which such alternative service would be deemed to be completed. Finally, there is no evidence that any order permitting alternative service was served with the summons and complaint on December 4, 1990.

How then, could the Utah Supreme Court arrive at its finding that Bar Counsel used reasonable diligence before December 4, 1990, in support of its conclusion that the substitute service upon petitioner in this case was proper? The answer reveals a criminal act by Bar Counsel and Bar Commission in this case. In arriving at its decision, Utah Supreme Court relied exclusively on one piece of evidence - the illegal extra-judicial affidavit of Stephen Trost that surreptitiously showed up in the official record on October 16, 1992, two weeks after the appeal was filed and over two years and ten months

after the attempted service of process on December 4, 1990.[3]

The fraud perpetrated by Bar Counsel and negligently caused by the Bar Commission was not discovered until petitioner was preparing this petition. Accordingly, evidence of the fraud was not before the Utah Supreme Court.

It seems clear from a close review of the file that Bar Counsel knew at the time of the Motion for Reconsideration that the service was defective, because he had not followed the procedure for proper service upon petitioner. He argued at the Motion for Reconsideration that Rule XI(b) service was proper, but he also included a general reference to "due diligence"

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3. It's highly unlikely that Bar Counsel did any investigation, where the record is clear that only one attempt at personal service was ever made, and that attempt was made on the same day the formal complaint was filed.

effort by his office to serve petitioner. However, Bar Counsel could not list any details of the "reasonable diligent" effort because it did not happen.

> The Bar exercised reasonable diligence to learn where Respondent could be reached and sent documents to those addresses where they should have been received by Respondent. *Response to Motion for Reconsideration*, P.2 (The pages are not numbered but it is the second page.) [Appendix Av-9-3]

It is revealing that in May, 1992 Bar Counsel did not assert any details concerning the "diligent investigation" that it purportedly undertook to serve petitioner on December 4, 1990. It also appears to be more than a coincidence that, although, this particular document is docket-stamped May 21, 1992, there is no original of this document in the official file. Rather, the only place this document appears in the file with the docket stamp is on page 212 of the Appellate Record, where a copy is buried in the file as exhibit #8 to the August 10, 1992 Memorandum of Points and Authorities

in support of the Motion to Affirm Findings, Conclusions and Recommendation of the Hearing Panel. (R. 212). Apparently, Bar Counsel had access to the official file to make a copy but chose not to put the original back in the file. This irregularity in the file creates at least an inference that Bar Counsel ,with cooperation of the Bar Commission, was trying to keep this document from attracting attention?

In light of all the problems with the official file, which petitioner raised by objection in his Appellate Brief [Appendix Av-24-10 to 14] to the Utah Supreme Court, it appears more than likely that Bar Counsel was manipulating the file to hide the fraud that was being perpetrated. For instance, about half of the documents in the official file are not docket-stamped, so there is no way to verify when a document was actually placed in the file. The documents are not in chronological order and many of the documents are not in any kind of

logical order at all. For example, the June 8, 1992 Order granting petitioner's Motion for Reconsideration is in the official file after the September 3, 1993 Order Affirming Findings, Conclusions and Recommendation; in fact, it is included in a separate, supplemental file, even though it was signed on June 8, 1992. In addition, two documents which were obviously filed, the Findings, Conclusions and Recommendation dated April 20, 1992, and Bar counsel's Response to Motion for Reconsideration dated May 21, 1992, do not even appear in the record at all, except as exhibits #5 and #8, respectively, attached to Bar Counsel's Memorandum of Points and Authorities in Support of Motion to Affirm Findings, Conclusions, and Recommendation of Hearing Panel, dated August 10, 1992. (R. 182-194, 212-215) [Appendix Av-17-3 to 14].

When the Motion for Reconsideration was granted, Bar Counsel knew than that his Rule XI(b)

service was defective and unless he could show reasonable diligence, his case would have to start from scratch and ultimately have to go to trial. From that point on, Bar Counsel schemed to plant in the official record some evidence that his office used "reasonable diligence" to locate petitioner prior to December 4, 1990.

The July 31, 1992 default gave Bar Counsel an opportunity to manufacture the fraudulent affidavit of Stephen Trost. He filed a Motion to affirm Findings, Conclusions and Recommendation of the Hearing Panel with a supporting memorandum on **August 10, 1992.** These documents with their attachments are in the official record, but are not docket stamped with the date they were filed with the Bar Commission. The supporting memorandum made reference to an investigation conducted prior to the service of the summons on December 4, 1990, by Bar Counsel,

Stephen Trost.

> Prior to serving Respondent [petitioner] by mail Bar Counsel, Stephen A. Trost, spoke with Jamis M. Johnson, Respondent's associate, who stated that he would forward to Respondent all correspondence addressed to Respondent which was received at his office at 165 South West Temple, Salt Lake City, Utah. In reliance upon that representation of Mr. Johnson, and the investigation done by the Office of Bar Counsel, the summons and formal complaint were sent by certified mail to Respondent at Mr. Johnson's office. The documents were received at that address and were not returned by the post office. The affidavit of Stephen A. Trost is attached hereto as Exhibit #2, and incorporated herein. Memorandum in support of Motion to Affirm Findings, Conclusion and Recommendation of Hearing Panel, P.2 (Pages are not numbered, but this is the second page) (Emphasis added) (R. 147) [Appendix Av-17-5 to 6]

The affidavit of Stephen Trost was alleged to have been attached as Exhibit #2 to the Memorandum, purportedly filed on August 10, 1992. (R.151) [Appendix Av-17-1 to 17]. The Trost affidavit could not have been attached to this Memorandum on August 10, 1992 because it was not yet in existence. The Trost

affidavit was not in existence on September 3, 1992, when the Bar Commission granted the Motion to Affirm the Findings, Conclusions and Recommendation. And, the Trost affidavit was still not in existence at the time the appeal was filed with the Utah Supreme Court on October 2, 1992. In fact, the Trost affidavit could not have made its appearance in the official court file until October 16, 1992, the date the affidavit was executed, which was the same day the official record was certified to the Utah Supreme Court. (R. 171-172) [Appendix Av-26-7].

Let us examine how Bar Counsel, with Bar Commission cooperation could accomplish this fraud. It appears that Bar Counsel knew the record was going to be certified to the Utah Supreme Court on October 16, 1992. The official record at that point did not have any evidence of Bar Counsel "diligent effort" to serve petitioner. Therefore, the Trost affidavit was secured

to be included in the official record, the same day. Bar Counsel then deceptively attached the affidavit to the August 10, 1992 Memorandum in Support of the Motion to Affirm Findings, Conclusions and Recommendation. Furthermore, the Trost affidavit was buried in with 11 other mostly irrelevant and extraneous exhibits attached to the Memorandum, to minimize the probability of discovery. The deception is also evident from the fact that the memorandum, with its numerous attachments, exhibits, and the false affidavits was not docket-stamped, apparently, to hide the discrepancy in the dates.(R.146-232) [Appendix Av-17-1 to 17]

The Trost Affidavit, although very vague, is the first document that shows any details of the Bar Counsel's purported "diligent effort" to serve petitioner. Stephen Trost, under oath, stated:

> 3. Due to the severity of the charges against Mr. Schwenke and his lack of response, I personally visited in or about December of 1990 the law

> office of Jamis Johnson located at 165 South West Temple, Suite 300, Salt Lake City, Utah where Mr. Schwenke office shared. See Exhibit A 1991 Capitol Reporters Legal Directory; Exhibit B a letter from Judge Murphy with enclosure [Feb. 1, 1991]; Exhibit C withdrawal of Counsel [Jan. 9, 1991] - all indicating 165 S. West Temple as the correct office address. *Affidavit of Stephen Trost*, para. 3. (R.171) [Appendix Av-17-6]. (Dates inserted for Exhibits B and C).

The summons and complaint was served on December 4, 1990, which was a Tuesday. Thus, Mr. Stephen Trost's investigation in or about December, 1990, prior to serving the summons and complaint, must have taken place between Saturday, December 1; Sunday, December 2; and Monday, December 3. The exhibits offered by Trost to prove his investigation prior to December 4, 1990 are documents dated in 1991. How Mr. Trost could rely on 1991 documents to determine the right address for service on December 4, 1990, boggles the mind.

Perhaps the most blatant misrepresentation

contained in the affidavit is Mr. Trost's claim that prior to serving the summons and formal complaint on December 4, 1990, he personally visited Mr. Jamis Johnson at Mr. Johnson's office where, Trost spoke to Mr. Johnson, and Mr. Johnson made the following representations:

1. If Mr. Trost used the 165 West Temple address to serve pleadings Mr. Johnson would see to it that Schwenke would receive the pleadings.
2. He confirms that Schwenke was no longer residing in the State of Utah.
3. Johnson had a telephone number and address of Schwenke's ex-wife in Las Vegas, where Schwenke could be reached.

Petitioner could have rebutted these false allegations, if he had been given the opportunity. In order to demonstrate this fact, petitioner has included the extra-judicial Affidavit of Jamis Johnson and refers to it in this brief, for that purpose only. The statement that Mr. Trost visited Mr. Johnson in his office prior to December 4, 1990, and the alleged representations made by Mr.

Johnson stated above, are absolute fabrication by Mr. Trost. See the extra-judicial *affidavit of Jamis Johnson*, [Appendix Av-23-1 to Av-23-3]. Mr. Jamis Johnson is certain he did not meet with Mr. Trost about this case anytime before December 4, 1990. *Johnson affidavit, paragraph 3* [Appendix Av-23-2]. Mr. Jamis Johnson knew that petitioner did not leave the state until mid-January, 1991 and he is certain that he did not tell Mr. Trost, prior to December 4, 1990, that Schwenke had already left the state. *Johnson affidavit,* paragraph 4 [Appendix Av-23-2]. Mr. Jamis Johnson knew that petitioner's ex-wife did not move to Las Vegas until mid-February, 1991, and he is certain that he did not make a representation to Mr. Trost, prior to December 4, 1990 concerning an address in Las Vegas that was not in existence until February, 1991. *Jonhson affidavit,* paragraph 6 [Appendix Av-23-2 to 3]. In fact, Schwenke's ex-wife was still doing accounting work in

Mr. Johnson's office in December, 1990. *Johnson affidavit,* paragraph 6 [Appendix Av-23-2 to 3].

Worse still, the Utah Supreme Court relied exclusively on Trost affidavit to find that petitioner was properly served with the summons and formal complaint on December 4, 1990.

> We now turn to the merits. While Schwenke raises several issues relating to the default entered against him for failure to answer the July 7, 1992, formal complaint within the time prescribed in the summons, we conclude that whether Schwenke was properly served with the December 4, 1990, summons and formal complaint is the dispositive issue. *In re Schwenke, supra.* at 1354. [Appendix Ai-14].

In concluding that the December 4, 1990 service was proper, the Utah Supreme Court made the following factual findings:

> (1) "The Bar investigated and determined that if the summons and formal complaint were mailed to Schwenke's last known address as shown by the official register of the attorneys of the Bar, in strict compliance with the rule, it was unlikely that Schwenke will receive them." *In Re Schwenke, supra.* at 1354. [Appendix Ai-16].

(2) "Before the summons and formal complaint were mailed, however, Bar counsel Stephen A. Trost met with Jamis M. Johnson, an attorney who subleased office space to Schwenke at the time. Johnson assured Trost that all mail sent by the Bar to Johnson's office (the same address where Schwenke had been practicing) would be forwarded to Schwenke. Accordingly, the summons and formal complaint were mailed to this address." *In Re Schwenke, supra.* at 1351. [Appendix Ai-4 to 5].

Therefore, it is crystal clear that, but for the false extra-judicial affidavit of Stephen Trost, illegally inserted in the official record by Bar Counsel, with the acquiescence of the Bar Commission, the Utah Supreme Court would not have had any factual basis for its holding. Unquestionably, this fraud on the court was patently violative of petitioner's due process rights, and resulted in the taking of his license to practice law without due process of law.

The Utah Supreme Court ruling, even assuming *arguendo* that it was not based on illegally manufactured evidence, is bad law and violated petitioner's due

process rights. As stated above, the prevailing view is that there must be a minimal showing that the attempted substitute service strictly complied with the statutory scheme. *See* cases cited above at pp. 17-19. Here, the Utah Supreme Court ruled that the Bar had exercised "reasonable diligence in good faith" based on Stephen Trost's affidavit. *In re Schwenke, supra,* 865 P.2d at 1355. [Appendix Ai-18]. However, the Trost affidavit merely stated that Stephen Trost visited Jamis Johnson at his office in or about December, 1990, and Jamis Johnson assured Stephen Trost that pleadings would be forwarded to petitioner. The Stephen Trost affidavit and the allegations contained in it hardly qualified for compliance with the statute. The affidavit needed to show that the identity or whereabouts of petitioner was unknown and could not be ascertained through reasonable diligence. *Rule 4(g) URCP* [Appendix Av-21-4 to 6]. The affidavit also needed to set forth in

detail the efforts made by Bar Counsel to identify, locate or serve the petitioner. *Id.* So, even if the Trost affidavit was available prior to December 4, 1990 to support a motion under Rule 4(g), the affidavit would not have been sufficient. See for example cases construing a rule similar to Rule 4(g), URCP. *Kintigh v. Elliot,* 570 P.2d 659 (Or. 1977); *A. Ter Har v. Backus,* 487 P.2d 660 (Or. 1971). If the belated affidavit is insufficient to support a Rule 4(g) motion, and no motion was ever filed and no court order allowing alternative service was ever issued, it would seem absurd for the Utah Supreme Court to conclude that Bar Counsel had complied with Rule 4(g).

The Utah Supreme Court ruling also implies that Jamis Johnson's alleged representations to Stephen Trost is binding on petitioner. Such implication is in direct contravention of prevailing law. An attorney is not an agent for service of process upon his client

unless the client has expressly or implied authorized the attorney to act in that capacity. See, e.g., *In Re Riverfront Food And Beverage Corp.*, 29 B.R. 846, 853 (E.D. Mo. 1983); *Bardahl Manufacturing Corp. v. District Court*, 372 P.2d 447, 449 (Colo. 1962). Additionally, the attorney's authority to act as agent for service of process cannot be based on representations solely by the attorney that he is so authorized. In *Re Riverfront Food And Beverage Corp., supra*, 29 B.R. at 853. Thus, Johnson's alleged representation to Stephen Trost, assuming *arguendo* that it was true does not bind the petitioner. This is particularly true, where Jamis Johnson was not even petitioner's attorney.

Because Jamis Johnson's representations were not binding on petitioner, and because Bar Counsel did not comply with the statutory scheme for substitute service, due process is violated by the mere act of the court exercising judicial power. *Cate v. Archon Oil Co.*,

*Inc,* 695 P.2d 1352 (Okl. 1983) citing the following: *Boddie v. Connecticut,* 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971); *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *Schroeder v. New York,* 371 U.S. 208, 211, 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.I.R.2d 1398 (1962). *Riverside & Dan River Cotton Mills v. Menefee,* 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910 (1915); *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363, 1369 (1914). The inescapable conclusion in light of the foregoing is that the criminal fraud perpetrated by Bar Counsel and acquiesced in by the Bar Commission, the failure of Bar Counsel to comply with Rule 4(g), and the Utah Supreme Court's invalid exercise of jurisdiction all violated petitioner's due process rights.

**(b) The Utah Supreme Court ruling that the March 2, 1992 hearing was a hearing on the merits of the formal complaint violated Federal due process.**

The notice of the March 2, 1992 hearing is

entitled as follows:

**NOTICE OF HEARING**

F-322 AND F-478
(CONSOLIDATED)

The body of the notice is stated verbatim as follows:

> TO: A. PAUL SCHWENKE
>
> Notice is hereby given that a hearing in the above-entitled matter will be heard Monday, March 2, 1992 at 9:00 a.m. in the Utah State Bar Offices, 645 South 200 East, Salt Lake City, Utah 84111 before the above hearing panel. (R.79) [Appendix Av-3-1 to 2].

The notice says nothing about a trial on the merits of the formal complaint. In fact, the notice says nothing about the purpose of the hearing or the subject matter to be discussed. Thus, this notice is constitutionally defective, because it failed to apprise petitioner of the pending matter. See *Aetna Insurance Company v. Hartshorn, supra.*, 477 F.2d 97. Because the Notice was invalid as a notice for a hearing on the merits of the formal complaint as well as a notice for a sanctions

hearing, the March 2, 1992 hearing was void.

(c) **The Utah Supreme Court violated petitioner's due process rights by improperly expanding the scope of the appeal without notice to petitioner.**

The Utah Supreme Court's Opinion is based solely on the affirmance of the default judgment entered in March of 1991. (R. 24-27, and *In Re Schwenke, supra,* 865 P.2d at 1355.) [Appendix Ai-1 to 20]. However, the issue of the validity of such default judgment was not presented to the Utah Supreme Court for review.

Schwenke's Petition sought review of the "Order Affirming Findings of Fact Conclusions of Law and Recommendation of Discipline," entered September 3, 1992. See *Notice of Appeal* dated October 2, 1992, (R. 142.) [Appendix Av-19-1 to 10]. The September 3, 1992 order was based solely on the default entered on July 31, 1992. Accordingly, if the July 31, 1992 default was void, it follows, a *fortiori* that the September 3, 1992 order was void. Therefore, Schwenke's focus

on the appeal was his challenge to the July 31, 1992 default. See *Notice of Appeal and Docketing Statement* [Appendix Av-19-1 to 26].

It is settled law in Utah that issues not involved in the specific judgment or order appealed from cannot be considered and determined on appeal. See, *Forbes v. Butler,* 275 P. 772, 774 (Utah 1928) [The Utah Supreme Court rejected the issue of accounting because no appeal was taken from that part of the trial court's judgment]. Therefore, absent a cross-appeal or cross-petition presenting other issues for review, the Court could address only those issues which were inherently a part of the September 3, 1992 Order, which was the subject of the appeal. See, *Terry v. Zions Co-op Mercantile Inst.,* 617 P.2d 700, 702 (Utah 1980) [If the appellee wishes to argue for alteration of the judgment to enlarge his rights, such as to revive a claim rejected by the court below, he must file a cross-appeal or cross-

petition.]

The Appellate Record and the applicable law clearly show that the only issues inherently included in a review of the September 3, 1992 Order were the following issues:

> 1) Was there a factual or legal basis to support the July 31, 1992 default?
>
> 2) Was Schwenke's motion to set aside the July 31, 1992 default impliedly denied by the September 3, 1992 order? If so, was the denial reversible error?
>
> 3) Could the Bar Commission adopt the Findings, Conclusions and Recommendation that had been recommended on April 20, 1992, and therefore, set aside by the June 8, 1992 Order granting petitioner's Motion for Reconsideration, without holding another sanctions hearing?

Because the dispositive issue analyzed and relied by the Utah Supreme Court was not within the scope of issues inherently included on the September 3, 1992 order, the decision of the Utah Supreme Court is void for lack of jurisdiction. *Forbes v. Butler,* 275 P. 772, 774

(Utah 1928); *Terry v. Zions Co-op Mercantile, Inst.*, 617 P.2d 700 (Utah 1980). Additionally, since the court expanded the scope of issues on appeal, at a minimum, due process considerations would require that petitioner be advised about reliance on the new issue so he could address it. Petitioner received no notice that the Utah Supreme Court was considering the issue of the validity of the December 4, 1990 service of process. Consequently, when petitioner prepared his appellate briefs he only addressed the issues within the scope of the appeal -- namely, whether the default judgment based upon the purported service of process of July 7, 1992, should be set aside. Furthermore, the default entered on the basis of the December 4, 1990 service of process was impliedly set aside by the June 8, 1992 Order granting the Motion for Reconsideration. Since the validity of the latter order was not placed before the Utah Supreme Court by Schwenke's appeal or by a

cross-appeal by the Bar, the Utah Supreme Court lacked jurisdiction to re-open said issue, *sua sponte*. *Id.*

(d) **The Bar Commission and Bar Counsel violated petitioner's due process rights when petitioner was caused to be served with a summons and original formal complaint on July 7, 1992, without leave of court.**

The Findings and Order Granting Respondent's Motion for Reconsideration was signed on June 8, 1992, but was not mailed to Schwenke until June 16, 1992. (S.R. 23). [Appendix Av-11-9]. Adding 3 days under URCP and 10 days pursuant to the Order granting petitioner's motion for rehearing, Schwenke's Answer was not due until June 29, 1992. See, *Rule 6(e), URCP* [Appendix Av-22-10] and *Order granting Motion for Reconsideration*, [Appendix Av-11-1]

Bar Rule XI(c)[Appendix Av-22-1 to 2] provides that an answer to the formal complaint "may raise such defenses and motions as are permitted under the Utah Rules of Civil Procedure." *Rule XI(c).* Under Rule 12(b)

URCP [Appendix Av-22-12 to 14], a defendant may serve a motion alleging the insufficiency of process or service of process, in lieu of filing an answer. *URCP Rule 12(b).* If such a motion is filed in lieu of an answer, the time for filing the answer is tolled until ten (10) days after the court enters an order denying such motion. *URCP Rule 12(a)* [Appendix Av-22-11 to 12].

In this case, Schwenke filed a timely motion to quash service, under URCP 12(b)(4) or (5). Accordingly, Schwenke had a legal right to file his answer within ten (10) days after receiving notice that the Order denying his Motion to Quash was entered. The Order denying his Motion to Quash was not entered until August 10, 1992 and was served by mail on August 12, 1992. (R. 137) [Appendix Av-16-1 to 3]. Adding three days for mailing and 10 days under the rule, Schwenke's answer was not due until August 25, 1992. *Rule 12(a), URCP.* Therefore, Schwenke's answer, filed on August 5,

1992, was timely filed by 20 days. Because Schwenke's answer was timely filed, there was no basis whatsoever for the entry of the July 31, 1992 default judgment. Accordingly, the setting aside of such default was mandatory as a matter of law.

The entry of the July 31, 1992 default was also violative of due process on another ground. Rule 4(b), URCP requires Bar Counsel to obtain leave of the Bar Commission to allow service of a summons and complaint more than 120 days after the filing of the complaint. [Appendix Av-21-2 to 3]. It is undisputed that the original complaint was filed on December 4, 1990, more than nineteen (19) months prior to the attempted service. Therefore, Bar Counsel was required to obtain leave of court prior to serving petitioner on July 7, 1992. Bar Counsel did not do so. Accordingly, Bar Counsel once again circumvented the procedural rules at the expense of petitioner's right to due process.

Clearly, without leave to allow service on July 7, 1992, the service was per se invalid because Bar Counsel did not have any legal right to effect service out of time.

(e) **The Bar Commission and Bar Counsel violated petitioner's due process rights when the Motion for Reconsideration was held without a transcribable record on May 28, 1992.**

Under Utah Law, a transcribable record of formal administrative proceedings are required to be kept at the agency's expense. *Utah Code Annotated (UCA) §63-46b - 8(1)(g); Bar Rule XII(b).* The purpose behind this due process requirement is to facilitate meaningful appellate review of the hearing proceedings.

In this case, the hearing on Petitioner's Motion for Reconsideration on May 28, 1992, was not recorded. Thereafter, petitioner requested that the written order be amended, because it did not conform with what occurred at the hearing. Because the hearing had not been recorded; a meaningful review by the Bar

Commission or the Utah Supreme Court was impossible. To add insult to injury, when the matter heard by the Bar Commission at the May 28, 1992 hearing was put at issue, the Utah Supreme Court looked to an extra-judicial affidavit of James Davis, submitted to the Utah Supreme Court, November 13, 1992 almost six weeks after the appeal was filed. In that affidavit, Mr. Davis self-servingly confirmed that what Bar Counsel had stated in the Order granting petitioner's motion to reconsider was what actually happened at the hearing. *Davis affidavit.* [Appendix Av-26-1 to 6].

The failure to keep a record of the hearing in this case, looks, feels and smells like a conspiracy. The Utah Supreme Court in essence has said: Bar Commission do not keep a record; so, if we want to affirm your findings of disbarment, we can just take your word for what happened. Isn't this type of one-sided, unfair adjudication what constitutional due process is

supposed to guard against?

(f) **The Bar Commission and Bar Counsel violated petitioner's due process rights by failing to follow rule 4-504, Utah Code of Judicial Administration in connection with the preparation and execution of the Order granting petitioner's motion for reconsideration and by participating in *ex parte* contacts concerning that order, in violation of Bar Rule XII(i).**

Procedure rules are intended to protect individuals due process rights. Accordingly, procedure rules are to be strictly complied with to ensure that due process rights are protected. See *cases cited, supra* at pp. 17-19. Usually, where the procedure rule is constitutional, a showing by the state that the rule was strictly complied with is sufficient to satisfy constitutional due process mandates. *Id.* Bar counsel and Bar Commission in this case did not even attempt to comply with the governing rules setting forth the procedure for adopting and entering a written order following a hearing. Such procedure is set out in Rule 4-504, Utah Code of Judicial Administration. [Appendix Av-22-14 to 15].

The rule contemplates that the winner at a hearing would be the better person to draft the order because he knew what he wanted and the legal basis for court's decision in his favor. This rule prevents the loser from attempting to better his position by placing extraneous, irrelevant findings into the order. However, the losing party also has an opportunity to object to inaccurate factual findings or inaccurate legal basis asserted by the winner. If the dispute persist, the court will hear the dispute and rule on the dispute before entering the final order. The rule clearly provides all parties with due process.

In this case, the Bar Commission instructed the losing party to draft the order after making its ruling. Then, the Bar Commission signed the order before the petitioner (winner) had a chance to look at the draft and object. As a result, petitioner was denied his right to an accurate and conforming Order. The outcome was a

clearly erroneous, inconsistent order, that also contained a false statement implying that petitioner lied to the Bar Commission (as discussed *supra* at pp. 9-10).

Rule XII(i) [Appendix Av-22-9 to 10] of the Bar Rules prohibits *ex parte* contacts between Bar Counsel and the Bar Commission to avoid improper influence by Bar Counsel of the Bar Commission's functions, especially since both entities are housed in the same building but also because *ex parte* contacts are violative of due process.

> It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendation to the decision maker. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it. *Sullivan v. Department of Navy,* 720 F.2d 1266 (1983) citing *Vitarelli v. Seaton,* 359 U.S. 535, 79 S. Ct. 968, 3L.Ed.2d 1012.

Mr. Davis in his extra-judicial affidavit admits that he had *ex parte* contact with Bar Counsel in preparing the

order that Mr. Davis signed and entered concerning petitioner's Motion for Reconsideration. See *Davis affidavit,* para. 9. [Appendix Av-26-5]. One can only imagine what Mr. Davis and Bar Counsel discussed at said meeting. One thing is for sure - they did not discuss complying with the applicable rules. Mr. Davis' willingness to twist and bend the rules and to illegally submit his extra-judicial affidavit to the Utah Supreme Court on behalf of the Bar tends to indicate that the *ex parte* discussion could not have been favorable to petitioner.

(g) **The Bar Commission and Bar Counsel violated petitioner's due process rights by deliberately and surreptitiously planting extra-judicial evidence in the official record of this case.**

How can one defend against fraud? It is virtually impossible. It is even more indefensible when the fraud is perpetrated by the government who is charged with enforcing the law and preventing fraud. All the due

process in the world would not protect any citizen, if those charged with enforcing the law chose to attain the desired result by any fraudulent means available, including breaking the law. The fraud on the Utah Supreme Court and petitioner in this case is a violation beyond constitutional magnitude and should not need further due process analysis.

There is one aspect of the fraud perpetrated against petitioner by Bar Counsel that should be addressed, however. The Utah Supreme Court shirked its duty and responsibility in this case regarding extra-judicial materials placed in the appellate record. Utah law mandates that the appellate record contain only those original papers and exhibits properly filed in the trial court prior to the appeal, and that augmentation of the record is allowed only to correct an omission or exclusion related to those original papers, but not to introduce new material into the record. *Olson v. Park-*

*Craig-Olson, Inc.*, 815 P.2d 1356 (Utah App. 1991). The Affidavit of Stephen A. Trost was newly manufactured evidence, which was illegally planted in the record. Although, the Utah Supreme Court may be excused for relying on the Stephen Trost affidavit, because of the deceptive manner in which it was submitted to the court, the James Davis affidavit was out in the open for the court to see, and Bar Counsel even referred to it as extra-judicial. There was no excuse for the Utah Supreme Court to rely on the Davis Affidavit, in arriving at its decision.

**(3) THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A RULING OF THE UTAH SUPREME COURT THAT CLEARLY DISCRIMINATES AGAINST PETITIONER ON ACCOUNT OF HIS RACE.**

The Utah Supreme Court concluded from the allegations of the extra-judicial affidavit of James Davis that petitioner withdrew his claim of racial discrimination. *In Re Schwenke, supra,* 865 P.2d at

1352. [Appendix Ai-8]. The Utah Supreme Court neglected to ask petitioner at any time during the proceeding whether or not he wished to pursue this claim. Petitioner raised that issue beginning with the hearing of March 2, 1992, and he will continue to assert the issue until it has been properly redressed.

The threshold question in equal protection analysis is whether or not unequal treatment exists. *Matter of Randall*, 640 F.2d 898, 903 (8th Cir. 1981); *Attorney Grievance Commission v. Kerpelman*, 438 A.2d 501, 508 (Md. App. 1981). It is undisputed that Bruce J. Udall is a Caucasian and petitioner is a racial minority. Petitioner and Bruce J. Udall were law partners at the time of the events charged in the formal complaint. Bruce Udall was charged with a similar formal complaint arising under the same facts as the petitioner's case. Yet, Bar Counsel stipulated to a settlement wherein Bruce Udall was only placed under probation, while Bar

Counsel sought and obtained sanction of disbarment against petitioner based on the questionable default. Accordingly, the petitioner has met the threshold question of unequal treatment by Bar Counsel, Bar Commission and the Utah Supreme Court.

It is worth noting that the record in this case shows clear and deliberate actions by Bar Counsel and the Bar Commission to bring about petitioner's disbarment. This includes bending and twisting the procedural rules at every turn, manufacturing evidence, illegally planting evidence in the official court file, and manipulating the content of the official court file. Although, petitioner raised the issue of the file not being prepared pursuant to the rules, he was ignored by the Utah Supreme Court who thereby acquiesced in the violations of his due process rights perpetrated by Bar Counsel and Bar Commission. See *Appellate Brief of Petitioner*, pp. 7-8 [Appendix Av-24-9 to 14].

Bar Counsel's and Bar Commission's conduct in this case can only lead to one conclusion, that those entities intentionally discriminated against petitioner. The Utah Supreme Court is not without blemish, either. It has been the Utah Supreme Court's standing policy to strike briefs that do not cite to the record. *State v. Price,* 827 P.2d 247, 249 (Utah App. 1992); *Trees v. Lewis,* 738 P.2d 612, 612-613 (Utah 1987); *Uckerman v. Lincoln Nat'l Life Ins. co.,* 588 P.2d 142, 144 (Utah 1978). Yet, when petitioner pointed out that same violation by Bar Counsel, the Utah Supreme Court denied the motion. [Appendix Av-25-8]. Bar Counsel was given an opportunity to conform it's brief to the rule, but failed to do so. In the end, Bar Counsel prevailed because the Utah Supreme Court's adopted most of the unsubstantiated and illegal factual allegations asserted by Bar Counsel with no citation to the record or the citations were to the illegally planted

evidence.

## CONCLUSION

This case is fraught with constitutional violations of petitioner's due process and equal protection rights. Those due process violations ranged from a simple failure to follow a procedural rule to criminal fraud upon the court and petitioner. These due process violations resulted in a disbarment of petitioner, based solely on an illegal, illegitimate entry of default on July 31, 1992. Furthermore, because, petitioner is a racial minority and member of a protected class, and his former Caucasian law partner charged with the same claims, received unequal sanctions, the threshold for an equal protection claim has been met. Accordingly, the petition for a writ of certiorari should be granted to prevent the gross miscarriage of justice that has been perpetrated against petitioner.

DATED this 20th day of June, 1994.

A. Paul Schwenke
Petitioner Pro Se
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Salt Lake City, UT 84101
Telephone:(801) 359-0600
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Ai- Published opinion of the Utah Supreme Court presented for review (12/01/94).

Aii- Order Affirming Findings, Conclusions and Recommendation. This is the order that was appealed to the Utah Supreme Court. (9/3/92)

Aiii- Order denying Motion for Rehearing. (1/18/94)

Aiv- None


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Av-2- Defaults certificates (5/28/91) and (5/19/91)

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2. Certificate of Readiness for Supreme Court Review.

In Re A. PAUL SCHWENKE
No. 920480

SUPREME COURT OF UTAH
December 1, 1993
Rehearing Denied Jan. 18, 1994
Cited as 865 P.2d 1350 (Utah 1993)

Disciplinary proceeding was brought against attorney. On attorney's appeal from Board of Bar Commissioners' recommendation of disbarment, the Supreme Court,

Hall, C.J., held that:

(1) attorney was properly served, and

(2) misappropriation of client funds warrants disbarment.

Disbarred.

1. Appeal and Error Key No. 1010.1(8.1)

Process Key No. 53

Whether person has been served with process is question of fact, and trial court's determination will be affirmed so long as it is supported by substantial evidence.

2. Appeal and Error Key No. 842(1)

Whether person was properly served is question of law, which was reviewed, without deference, for correctness.

3. Attorney and Client Key No. 48

Attorney was properly served in disciplinary proceeding where summons and formal complaint were sent to attorney's last known address, after bar counsel received assurance from person who formerly subleased that space to attorney that all mail sent to address would be forwarded to attorney, whose whereabouts were otherwise unknown to bar; attorney was aware of pending proceedings, and attorney was in fact afforded full-scale hearing on merits of allegations against him. State Bar Rule XI(b).

4. Constitutional Law Key No. 287.2(5)

In disbarment proceedings, adherence to minimum due process requirements includes notice of hearing. U.S.C.A. Const. Amend. 14.

5. Attorney and Client Key No. 58

Misappropriation of client funds warrants disbarment and order of restitution.

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A. Paul Schwenke, pro se.

Wendell K. Smith, Salt Lake City, for the Bar.

HALL, Chief Justice:

A. Paul Schwenke appeals an order of the Board of Bar Commissioners ("the Board") affirming a hearing panel's findings of fact, conclusions of law, and recommendation of discipline that included a recommendation that Schwenke be disbarred and pay restitution in the amount of $97,250. We affirm.

In 1985, Schwenke represented Caren Serr in a personal action. In 1987, Serr and her husband Ron Serr filed a complaint with the Office of Bar Counsel ("the Bar") alleging that Schwenke had violated the Rules of professional Conduct by misappropriating approximately $100,000. in the course of settling Serr's personal injury case. The matter was then held in abeyance pending outcome in civil litigation between the parties. On September 19, 1989, the parties entered into a stipulation in the third district court in which Schwenke agreed to a $100,000 judgment

against him based on fraud, not dischargeable in bankruptcy.

On December 4, 1990, a summons and formal complaint that incorporated by reference the September 1989 stipulation were issued. Schwenke's actual whereabouts were unknown to the Bar. The Bar investigated and determined that if the summons and formal complaint were mailed to Schwenke's address shown on the official roster of attorneys, it was unlikely that Schwenke would receive them. Consequently, the summons and formal complaint were served upon Schwenke by certified mail directed to the office where Schwenke was known to have been practicing law. Before the summons and formal complaint were mailed, however, Bar counsel Stephen A. Trost met with Jamis M. Johnson, an attorney who subleased office space to Schwenke at the same time. Johnson assured Trost that all mail sent by the Bar to Johnson's office space

(the same address where Schwenke had been practicing) would be forwarded to Schwenke. Accordingly, the summons and formal complaint were mailed to this address.

It appears that sometime in the middle of January 1991. Schwenke left the state and did not provide the Bar with his new address. While Schwenke's whereabouts were unknown to the Bar between the time the summons and formal complaint were served and the time he left in mid-January, Johnson claimed that Schwenke remained in contact with his office. On January 11, 1991, a notice of intent to default was sent by certified mail to the address where Schwenke had conducted his law practice. On March 5, 19991, a request for entry of default was submitted to the executive director of the Bar, and on March 19, 1991, default was entered against Schwenke.

On March 28, 1991, the Bar mailed a request for

a sanction hearing to the office where Schwenke had been practicing law. On May 24, 1991, notice of a sanctions hearing set for July 22, 1991, was mailed to the same address. On December 6, 1991, notice of the sanctions hearing reset for March 2, 1992, was sent by certified mail. this time to Schwenke's last known address as shown on Bar roster. In addition, a copy of the notice of hearing was sent to a Las Vegas Nevada, residence.

Between the time the notice of hearing was sent and the date of the hearing, Schwenke did not answer the complaint. On March 2, 1992, the sanctions hearing was held. Schwenke appeared at the hearing, admitting that he learned of the sanctions hearing on approximately February 6, 1992, and that he knew of the sanctions hearing from the notice that had been sent to the Las Vegas address. Even though default had been entered against Schwenke, the merits of the

complaint were addressed. The Bar called witnesses and introduced documentary evidence establishing the facts and violations charged in the formal complaint. Schwenke cross-examined witnesses and testified in his own behalf. At the conclusion of the hearing, the panel entered findings of fact, conclusions of law, and a recommendation that Schwenke be disbarred. The panel further recommended that he make restitution to Serr in the amount of $97,250.[1]

On May 4, 1992, the Board approved by order the hearing panel's findings, conclusions, and recommendations of discipline. On May 19, 1992, Schwenke moved for reconsideration of the order. He contended that he was not properly served with the

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1. The hearing panel found that pursuant to the $100.00 stipulated judgment entered by third district court. Schwenke had paid $250 and conveyed a Duchesne County property valued at 2,500. to Serr, leaving a balance of $97,250.

summons and formal complaint and that the only pleading he received was the notice of hearing for March 2, 1992. He sought an order requiring "adequate and proper" service of the summons and formal complaint. He asserted that the hearing panel's findings, conclusion, and recommendation of discipline were racially motivated. The Board granted a hearing on Schwenke's motion for reconsideration.[2]

At the May 28, 1992, hearing on Schwenke's motion for reconsideration, Schwenke withdrew his contention that the hearing panel's action was racially motivated. After considering all the facts and circumstances, the Board concluded that the hearing panel had appropriately found that Schwenke was

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2. We note that on May 19, 1992, Schwenke had in an affidavit that his address on the official Bar roster was P.O. Box 57853, Murray, Utah 84107, the same address to which the notice resetting the sanctions hearing was sent.

properly served with summons and formal complaint. In addition, the Board concluded that Schwenke had been afforded a fair hearing on the merits of the complaint in that he appeared a the hearing, confronted the witnesses against him, examined the evidence, and presented matters in his own defense. Notwithstanding, the Board granted Schwenke's motion for reconsideration and afforded him the opportunity to file an answer, after which the hearing panel would reconvene and consider any additional matters presented by the parties. Accordingly, the Board ordered Schwenke to file an answer to the complaint. Instead of filing an answer, however, he filed an objection to the Board granting his motion for reconsideration, arguing that despite the Board's findings, he had not been properly served and therefore could not be ordered to file an answer.

On July 7, 1992, the Bar caused Schwenke to be

personally served with summons and formal complaint. He again failed to file a responsive pleading, and on July 31, 1992, default was again entered against him. On August 5, 1992, nine days after the prescribed time had expired, Schwenke filed an answer to the July 7, 1992, summons and formal complaint. He contended that he thought he had hand-delivered a copy of the answer along with some other documents relating to another matter to the Bar on July 17, 1992. Later, he learned that instead of putting a copy of the answer in the envelope with the other documents, he had "inadvertently" placed it in his file. As a result, the answer was not filed within the prescribed in the summons. He claims that when he learned of the mistake, he filed a late answer even though default had been entered against him.

On August 10, 1992, the Board considered and denied Schwenke's objection to their earlier order on

the ground that the objection was rendered moot by personal service of the July 7, 1992, summons and formal complaint.[3] On August 10, 1992, the Bar filed a motion with the Board to affirm the hearing panel's findings, conclusions, and recommendation of discipline entered following the March 2, 1992, sanctions hearing. On August 11, 1992, Schwenke moved to set aside the default certificate pertaining to the default entered July 31, 1992. The Bar responded, opposing Schwenke's motion, the Board entered an order on September 3, 1992, affirming the hearing panel's

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3. The order was drafted before the entry of default on July 31, 1992. At the time, it was presumed that Schwenke would file an answer to July 7, 1992, summons and formal complaint. As a result, the order provides that Schwenke's objections could be presented to the hearing panel when it met to reconsider his case. Because Schwenke never filed an answer to the July 7, 1992, summons and formal complaint, default was entered. Portions of the order which mention a later hearing were no longer applicable.

findings of fact, conclusions of law, and recommendation of discipline, which included the recommendation that Schwenke be disbarred.

Schwenke appeals, arguing that the default entered against him for failing to answer the July 7, 1992, summons and formal complaint within the time prescribed in the summons and resulting order affirming the hearing panel's findings of fact, conclusions of law and recommendation of discipline should both be set aside. He asserts that his default was due to mistake, that it is fundamentally unfair and reversible error for the Board to ignore his motion to set aside the default certificate, and it was unfair for the Board to enter a default certificate before ruling on his objection to the order granting his motion for reconsideration.

We begin by addressing a threshold matter. At the time of oral argument, Schwenke appeared pro se and objected to this court's use of the stipulation that

he and Serr entered into in the third district court. Schwenke contended that the stipulation, by which he agreed to a $100,000 judgment against him based on fraud and nondischargeable in bankruptcy, was merely oral and was not part of the district court record. After examining the record, we conclude that Schwenke was less than candid with this court. The record in this proceeding contains two copies of the stipulation and order that were part of the record in this proceeding before the district court. A review of the transcript of the March 2, 1992 sanctions hearing reveals that two copies of the stipulation and order were placed in evidence at the hearing, one, a certified copy of the stipulation and order prepared by Serr's counsel after the parties agreed to the terms of stipulation, was subsequently signed by Judge A. Rokich; the other. a copy of the same stipulation and order, bear's Schwenke's signature and contains minor

modifications.[4]

We now turn to the merits. While Schwenke raises the issues relating to the default entered against him for failure to answer the July 7, 1992, formal complaint within the time prescribed in the summons, we conclude that whether Schwenke was properly served with the December 4, 1990, summons and formal complaint is the dispositive issue.[5]

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4. Apparently, after Schwenke received a copy of the stipulation and order prepared by Serr's counsel, he did not feel that the stipulation accurately represented the parties' oral agreement entered into in open court. As a result, he made a few minor modifications and signed the stipulation.

5. Schwenke contends that because he argued in his motion for reconsideration that the had not received the summons and formal complaint and because the Board subsequently granted his motion, the issue of whether he was properly served with the December 4, 1990, summons and complaint was adjudicated in his favor. Schwenke is mistaken. The Board concluded that the hearing panel had found that he was properly served. Furthermore, it is clear that the

[1,2] We begin our analysis by stating the applicable standard of review. This case presents a mixed question of law and fact. Whether a person has been served with process is a question of fact.[6] Whether a person is properly served, however, is a question of law.[7] We will sustain factual findings by the hearing panel so long as they are supported by substantial evidence.[8] We afford no deference to conclusions of law but review them for correctness.[9]

[3] Rule XI(b) of the Procedures of Discipline of

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Board granted Schwenke's motion solely to allow him an opportunity to file an answer and present the merits of his position.

6. Reed v Reed. 806 P 2d 1182, 1184 n. 3 (Utah 1991) (citing Carnes v Carnes. 668 P 2d 555, 557 (Utah 1983)

7. Id

8. In re Discipline of Schwenke. 849 P 2d 573, 576 (Utah 1993)

9. Reed. 806 P 2d at 1184-1185

the Utah State Bar provides, "Service shall be made personally upon the attorney in question or by registered or certified mail to the last known address as shown by the official roster of attorneys of the Bar." At the time of service, Schwenke's whereabouts were unknown to the Bar, thereby precluding personal service. The Bar investigated and determined that if the summons and formal complaint were mailed to Schwenke's last known address as shown by the official roster of attorneys of the Bar, in strict compliance with the rule it was unlikely that Schwenke would receive them. The Bar then served the summons and formal complaint on Schwenke by certified mail at the office of Jamis M. Johnson. This was the office where Schwenke had been practicing law and was his last known actual address. Prior to serving the summons and formal complaint, Bar received assurance from Johnson that all mail sent by

the Bar to Johnson's office would be forwarded to Schwenke.

On January 11, 1991, a notice of intent to default was sent by certified mail to Johnson's office under the same agreement that it would be forwarded to Schwenke. Evidence suggests that Schwenke remained in the state until mid-January 1991 and that up until the time he remained in contact with Johnson's office. Additional evidence indicates that Schwenke was aware of the action taken by the Bar in the present matter and that he requested that Johnson watch for correspondence from the Bar. Notwithstanding, Schwenke failed to respond to the summons and formal complaint. Thereafter, a request for entry of default was mailed and default was sent certified mail under the same arrangements with Johnson. Schwenke still failed to respond.

We have observed that under the more stringent

requirements of service of process under Utah Rule of Civil Procedure 4, it is not required that a plaintiff exhaust all possibilities as a means of finding and serving a defendant, only that the plaintiff exercise reasonable diligence in good faith.[10] The Bar has met this requirement.

[4] We have also previously determined that in disbarment proceedings, adherence to minimum due process requirement includes notice of a hearing.[11] On December 6, 1991, a notice of hearing set for March 2, 1992, was sent by certified mail to Schwenke's address as shown on the official roster of attorneys of the Bar and to the Las Vegas address. Schwenke appeared at the sanctions hearing and admitted that he received notice of the hearing February 6, 1992, at the Las

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10. Downey State Bank v Major-Blakeney Corp. 545 P 2d 507, 509 (Utah 1976)

11. Schwenke, 849 at 576.

Vegas residence. Between the time Schwenke received the notice of hearing and the date of the hearing, he neither contacted the Bar nor filed an answer to the formal complaint. At the sanctions hearing, Schwenke cross-examined witnesses called by the Bar and testified in his defense as to the charges set forth in the formal complaint. We accordingly conclude that Schwenke was properly served with the summons and formal complaint on December 4, 1990, and that all subsequent documents were also properly served, thereby affording adequate notice and opportunity to respond to the charges leveled against him. Although Schwenke was in fact in default, he was nevertheless afforded a full-scale hearing on the merits of the allegations against him.

We have duly considered Schwenke's other arguments and find them to be without merit.

[5] The order of disbarment and the payment of

restitution is affirmed.

HOWE, A.C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR
Disciplinary Hearing Panel:
Robert Wallace, Chair
E. Gregg Tobler
Sandra Wilkins

| | |
|---|---|
| In the Matter of the Complaint by | ORDER AFFIRMING FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION DISCIPLINE |
| CAREN SERR against | |
| | F-322 |
| A. PAUL SCHWENKE<br>DOB: 10-12-51<br>ADM: 05-09-83 | |

Pursuant to Rule XII(e) of the Procedures of Discipline, the Board has reviewed the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Disciplinary Hearing Panel. It hereby affirms those determinations, adopts them as its own, and incorporates them by reference into this order.

Dated this 3rd day of September, 1992.

BOARD OF BAR COMMISSIONERS-

By

_____

Randy L. Dryer
President

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order in the matter of F-322 was mailed to A. Paul Schwenke, Attorney at Law at 106 Magic Dr., Murray, Ut 84107 on this 9 day of September, 1992.

_____

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

January 18, 1994

OFFICE OF THE CLERK

Paul H. Johnson
JOHNSON & LAWRENCE, P.C.
Attorneys at Law
10 West Broadway, Suite 311
Salt Lake City, UT 84101

In re: A. Paul Schwenke,
No. 920480 F-322

THIS DAY, Petition for Rehearing having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that a rehearing be, and the same is, denied.

Geoffrey J. Butler

Clerk

There is no judgment that would come under catagory #iv.